APPEAL FROM ORIGINAL DECREE NO.66 OF 1974

AGAINST THE JUDGMENT AND DECREE DATED 25.9.1973 AND 17.11.1973 RESPECTIVELY PASSED BY SHRI LAKSHMI CHARAN, IST ADDITIONAL SUBORDINATE JUDGE, PURNEA IN TITLE SUIT NO. 65 OF 1966/71 OF 1968.

MOJIBUR RAHMAN & OTHERS……APPELLANTS.

-Versus-

JAGDEO YADAV AND OTHERS……...RESPONDENTS.

For the Appellants :Mr.Sadaquat Hussain,Sr.Advocate, M/S.Abdus Salam, and Chandra Mauli Pd. Singh,Advocates.

For the Respondents: M/S.Ramesh Kumar Jha,Mrs. Pallavi Mishra and Rajendra Kr Jha,Advocates

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P R E S E N T

THE HON'BLE JUSTICE SMT.SHEEMA ALI KHAN

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Sheema Ali Khan,J.

This is Civil First Appeal against the judgment and decree of Ist Subordinate Judge, Purnea in T.S.No.65 of 1966. It is well established that unlike criminal case where the case has to be proved beyond reasonable doubt in a Civil Suit the decision is based on preponderance of probability taking into consideration the oral and documentary evidence in the case. This is how the Learned Subordinate Judge has approached the case and similar is the approach of this Court in deciding this

appeal.

The appellants are the plaintiffs in this suit.

The suit was filed for declaration of title over 3 Bigha 9 Katha 15 Dhoors of land appertaining to R.S.Plot no.1320 and 1325 respectively.

The case of the plaintiffs is that the plaintiff No.1 on his behalf and on behalf of his minor son had negotiated with the defendant with respect to sale of the properties in the suit on 11.7.1966 and they agreed that the lands would be sold for a sum of Rs. 11000/-. Three sale deeds were executed with respect to the lands in question.

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The defendant executed the first sale deed for Rs.7000/- in favour of the plaintiff no.1 with respect to plot no.1324.

The second sale deed was executed for Rs.2,000/-with respect to 17 Katha and 17 Dhoors of land in favour of the minor sons of appellant no.1 with respect to plot no.1320 and the third sale deed was executed in favour of the plaintiff nos.4 and 5 the

sons of the plaintiff no.1 for Rs.2,000 with respect to 1 Bigha and 1 Dhoor of land of plot no.1324 and 3 Katha 8 Dhoor of land on plot no.1325.

It is case of the plaintiff that out of total sum of money of Rs.11,000 ,Rs.6914 was paid to the defendant in cash and the rest of the amount was set off towards a loan contracted through mortgaged deeds which were executed by the defendant in favour of the plaintiff and his brother Zahiruddin.

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The plaintiff case further is that at the time of registration Sudhbharna was left at his house and he could not hand over the Sudhbharna and there was an understanding between the plaintiff and the defendants that he would keep the registration receipt of the sale deed with him and would hand over the same when the plaintiff handed over the Sudhbharna mortgaged deed to the defendant. Although the plaintiff went to the house of the defendant on several occasions to hand over the mortgaged deeds and to get registration

receipts the defendant made some frivolous excuses and did not handover the registration deed to him, which created a cloud over the title of plaintiff, and as such, he has filed the present suit.

The defendant has denied the case of the plaintiff and has stated that the Sudhbharna deed was redeemed by him and in fact the defendant had never executed a hand note in favour of the plaintiff. It is the case of the defendant that he owed money to one Baleshwar Bhagat and Shiv Shankar Prasad Bhagat and when they were insisting of payment of money the defendant was compelled to execute a mortgaged deed in favour of Jai Narayan Marwari for Rs.2900/- for a different land of his own.

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The defendant denies that the plaintiff had paid any cash at the time of the registration of the sale deed and he has in fact has not been able to pay the two Mahajans from whom he had borrowed the money as he was not paid any consideration amount by the plaintiff. The defendant further claimed that there was several purchasers

for his land and so the defendant gave in Sudhbharna some other lands to Jai Narayan Marwari for Rs.2900/-and out of the said money he redeemed two Sudhbharna bonds which he had executed in favour of the plaintiffs on 11.7.1966 and came in possession of the lands i.e. the lands which are subject matter of the sale deeds.

The further case of the defendant is that he redeemed the Sudhbharna bond in favour of Plaintiff no. l and the other bond in favour of plaintiff no.1,and his brother, Zahiruddin, on 11.7.66 out of the amount received from Jai Narayan Marwari to whom he had mortgaged some other land for Rs.2900/-. The Plaintiff no.1 returned the original mortgage bond which was in his favour after making endorsement regarding redemption. So far as the second usufractory mortgage bond which is in favour of Zahiruddin Plaintiff no.1 granted a duly stamp receipt, attested by Bashiruddin the relation and Karpadar of the plaintiff.

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Thus, the plaintiff no. 1 who has played fraud on the defendant, and as such,

the defendant had not handed over the registration receipt to the plaintiff.

These being the pleadings of the parties the court below has raised 8 issues. The important issue that would decide the matter in hand are Issue Nos. 3,4 and 5 which are:

"(A) Had the defendant executed three sale deeds to the plaintiff regarding the land in question.

(B) Had the plaintiff paid the consideration money of Rs. 11,000/- concerning the three sale deeds by making cash payment of Rs. 6914/- by setting off Rs. 2,000/- and 875/- the mortgaged bond and Rs. 211/- regarding the hand note dated 10.5.1966.

(C) Had the plaintiff made no payment of the consideration amount."

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The Court below while considering these issues came to the findings, that the three

sale registration receipts remained with the defendants.

The plea taken by the plaintiff that the mortgaged bonds were redeemed on 14.7.1966 and not on 11.7.1966, is not tenable and that after defendant had redeemed the mortgages, the title did not pass to the plaintiff on execution of the sale deed.

The question that has to be decided is whether the consideration amount was paid by the plaintiff to the defendant at the time of execution of the sale deed and whether the defendant had redeemed the mortgage on 11.7.1966 as claimed by the defendant or whether the plaintiff's case that the receipts were granted on 14.7.1966 is correct.

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So far as the sale deed is concerned, there is no dispute regarding the execution of the sale deed which are exhibits 2,2(a) and 2/b.

The witnesses on this point are P.W. 10 and P.W.3 and P.W.5. It would be relevant to refer to the statements made by

these witnesses. Regarding the execution of the sale deed and also whether they had stated anything with respect to the payment of the consideration amount.

P.W.3's explanation regarding the payment of consideration of Rs.11,000/- is that Rs. 6914/-was paid in cash, and there was adjustment of Rs.2000/-and Rs.1875/- towards payment of usufructory mortgage and Rs.211/- towards a hand note,although he states that the 'Kewala' does not mention that Rs. 2000/- and Rs. 211/- were considered set off and part of the consideration money to be paid to the defendant.

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The defendant has not disputed the case of execution of the sale deed although he has denied that he had received the cash amount which was to be paid at the time of the execution of the sale deed. Thus it is admitted fact that the sale deed was executed, however, the defendant's case is that, even after the execution of the sale deed the 'Chirkut' remained with the defendant as he had not been paid the

consideration money and the plaintiff had not handed over the two Sudhbharnas at the time of registration.

The question that arises therefore, is whether the consideration money was paid and whether the sale deed contained the facts regarding the outstanding dues. The plaintiff's case is that Rs. 6,914/- had been paid in cash and the outstanding dues were to be settled by satisfaction of the mortgaged amount. None of the other witness have stated anything regarding the handing over of the cash amount of the consideration money. Thus the Trial Court has rightly examined the sale deeds Exhibit 2 series to find out whether payment had been made. However, this fact has not been noted in the sale deed. The cash amount could have well been paid before the Registrar and this fact noted in the sale deed which would have put an end to the controversy.

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The other important aspect is that Registration receipts of all three documents remained with the defendant who has put forward a case that he did not hand over the

receipts as he was not handed over the mortgaged documents and the cash amount. P.W.3 was present when the documents sale deeds were written. Regarding the payment of consideration amount, he has stated that Rs.1,875/- was set off towards the usufractuary mortgage bond executed by Munni Lal in favour of plaintiff Shamshuddin. Rs.2,000 was set off towards the usufractuary bond executed by Munni Lal in favour of Zahiruddin (brother of Shamshuddin). P.W.3 has also proved Exhibits 3 and 3/A, which is the satisfaction note of the two mortgage deeds. The date on the two notes is 11.7.66, whereas the sale deed has been executed on 14.7.66. The date of the satisfaction note becomes important as according to the plaintiff the date should have been 14.7.66. The plaintiff has not been able to give any satisfactory explanation as how the date was endorsed as 11.7.66 when according to the plaintiff the transaction was on 14.7.66, the date on which the sale deed was executed. P.W.4 has tried to explain this

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fact by stating that the negotiation had taken place on 11.7.66, and as such, 11.7.66 has been mentioned in the satisfaction note.

P.W.3, P.W.4, P.W.5 and P.W.9 have all supported the case that a note was prepared in the presence of Shamshuddin and Munni Lall in which it has been stated that Shamshuddin has received part payment against the usufructory mortgage bond which was paid by Munni Lall. It has also been mentioned in the satisfaction note that since Zahiruddin was not present in the house, the mortgage deed could not be handed over to Munni Lal. It is the consistent evidence of all the plaintiffs witnesses as well as the defendants witness that the Chirkuit was not handed over to the plaintiff as he had not handed over mortgage deeds. I find that there is insufficient evidence as far as payment of consideration amount on 14.7.66 is concerned. It is the case of the plaintiff in the plaint as well as at the time of leading evidence that he paid Rs.6,914/-in cash, whereas the defendant has denied receiving the said

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payment in the written statement and in his evidence, thus this court has to consider the broad probabilities of the case and test the evidence of witnesses.

Another aspect which may be taken into consideration is the story with respect to the satisfaction note executed for redemption of the mortgage. The satisfaction note is 3(a) and (b). Actually, the execution of this Exhibit 3(a) and (b) gives a fatal blow to the case of the plaintiff. The plaintiff's case is that the two mortgage bonds were to be set off alongwith hand note of Rs.211/- against the consideration amount. In my view it does not stand to reason that the defendant should pay the mortgage amount of Rs.1,875 and Rs.2000 to the plaintiff. If the money was to be adjusted against the price of land, it would have been sufficient to incorporate this fact in the sale deed which has not been done. On the other hand, the case of plaintiff also suffers a further set back when he states that the date of execution of

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the satisfaction note was 14.7.66 as the stamps purchased for executing the sale deed were purchased on 18.1.66 by Shamshuddin and Munni Lall (defendant) purchased the stamps on 13.7.66 and 14.7.66. Therefore, it appears that although the sale deed was executed, the Chirkut remained with the defendant as he had not received the original mortgage deeds. I cannot hold that the consideration money was not paid as there is not enough evidence on this point.

The plaintiff further claims that he insisted the defendant several times in order to retrieve the Chirkut and hand over the usufructory bonds of the plaintiff but the defendant refused to hand over the Chirkut on one or the other ground. In this context Exhibit-4 is a petition by the plaintiff to the Sub Divisional Officer making a complaint as set out in the plaint that the defendant was not handing the Chirkut and that he apprehended fraud.

This is a self serving statement and no importance can be attached to it when the plaintiff has not led any evidence to show

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fraud.

The defendant has led evidence to show that he did hot hand of the Chirkuit as he was not paid the consideration amount. There are two witnesses on this point. The defendant D.W.8, himself and D.W.2. D.W.2 at Para 2 has stated that the money was not handed over to the defendant in his presence. At paragraph 6 this witness says that he heard D.W.8 and plaintiff speak to each other. Shamshuddin told the defendant that all the money matters would be settled when they return to the village. D.W.8(defendant)on the other hand has supported his case and stated that he had not received any money from the plaintiff when the sale deed was executed . He further denies that he had received Rs.6914/as part payment. With respect to redemption of mortgage, the defendant's case is that he had redeemed the mortgage bond on 11.7.66. The plaintiff has challenged this document, on the ground that the L. T. I. does not belong to him. The L. T. I. was sent to an expert by the defendant, who has been

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examined as D. W. 11. The report of the expert shows that the L. T. I. and specimen photograph is the same.

To sum up:

(1) The plaintiff's case that he has paid Rs.6914/- is not supported by the relevant document which is for Rs.7000/- and not Rs.6914/-.

(2) So far as mortgage in favour of Zahiruddin is concerned, it is said to be for Rs.1875/-. None of the sale deed is for Rs.1875/-.

(3) The case of the plaintiff regarding cash payment, adjustment towards mortgage amount is not supported by three documents of sale in none of which the reasons as made out in the plaint have been mentioned.

(4) There is acceptable oral and documentary evidence to show that the loan advanced against the two usufructory mortgages were paid on 11.7.66 and hence there was no question of any subsisting loan on 14.7.66.

(5) The denial of endorsement dated 11.7.66 is proved to be unacceptable on the basis of evidence in the case including that of the

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expert D.W.11.

(6) The hand note alleged to have been executed for Rs.211/- has not been produced nor any reliable evidence adduced to show that such a document was executed.

(7) If actual payment was made at the time of executions of the deeds there is no reason why such payment was not made before the Registry Office.

(8) There is no acceptable reason as to why the Chirkut was not given in respect of deeds other than those relating to Zahiruddin mortgages.

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(9) The oral and documentary evidence adduced by the defendant Munni Lal is preferable to those of the plaintiffs for the reasons discussed in this judgment and that of the trial court.

That in the circumstances discussed above title was to pass on payment of consideration in respect of the three deeds. The consideration not having been paid by the plaintiff, and that is why Chirkut of the three deeds was retained by the defendant and consequently the

plaintiff was not entitled to a decree in his favour.

In the result, this appeal is dismissed but without costs.

(Sheema Ali Khan, J.)

PATNA HIGH COURT
Dated,27.6.2008
AFR/NAFR/U.K./
Secretary.

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